St. Joseph's Hospital *and* Local 1199 R.I., a Subdivision of National Union of Hospital and Health Care Employees, a Division of RWDSU, AFL-CIO. Cases 1-CA-11825 and 1-RC-13628

August 13, 1982

DECISION, ORDER, AND DIRECTION OF FOURTH ELECTION

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND JENKINS

On February 10, 1982, Administrative Law Judge Nancy M. Sherman issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt her recommended Order.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, St. Joseph's Hospital, Providence, Rhode Island, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

IT IS FURTHER ORDERED that the election held on April 29, 1976, in Case 1-RC-13628 be, and it hereby is, set aside and that Case 1-RC-13628 be, and it hereby is, remanded to the Regional Director for purposes of conducting a rerun election.

[Direction of Fourth Election and *Excelsior* footnote omitted from publication.]

[1] The General Counsel did not except to the Administrative Law Judge's finding that the no-solicitation rule promulgated by Respondent in November 1977 did not violate Sec. 8(a)(1) of the Act.

[2] Chairman Van de Water finds it unnecessary to rely on the Administrative Law Judge's citation of *T.R.W. Bearing Division, a Division of T.R.W., Inc.*, 257 NLRB 442 (1981), in the last paragraph of sec. II of her Decision.

DECISION

STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge: Case 1-CA-11825 is based on a charge filed by New England Health Care Employees Union, District 1199, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO[1] (the Union), against St. Joseph's Hospital (the Hospital), on May 27, 1976, and amended on July 8 and 22, 1976, and a complaint which issued on October 27, 1976. Case 1-RC-13628 is based on a petition filed by the Union on November 26, 1974, pursuant to which a representation election was conducted on April 17, 1975 (lost by the Union); a rerun election was held on October 30, 1975 (also lost by the Union); and a second rerun election was held on April 29, 1976 (also lost by the Union). On May 6, 1976, the Union filed timely objections to conduct affecting the results of the April 1976 election.

The October 1976 complaint alleges that since on or about November 27, 1975, the Hospital had violated Section 8(a)(1) of the National Labor Relations Act, as amended (the Act), by maintaining an overly broad no-solicitation rule. Objection 5 of the Union's May 1976 objections alleges that the Hospital had promulgated an unlawfully broad no-solicitation rule and had also enforced its no-solicitation and no-distribution rules unlawfully. In a third supplemental decision on objections issued on July 9, 1976, the Regional Director overruled all the May 1976 objections except Objection 5, which, he stated, raised issues identical to the issues to be presented in the complaint authorized by him and should be resolved at a hearing along with the issues involved in the unfair labor practice case. On October 27, 1976, the Acting Regional Director consolidated the two cases for hearing, pursuant to Section 102.33 of the Board's Rules and Regulations.

The consolidated cases were initially heard in Boston, Massachusetts, on April 27, 1977, before Administrative Law Judge Leonard M. Wagman. On July 11, 1977, Administrative Law Judge Wagman issued his Decision, sustaining the complaint and recommending that the April 1976 election be set aside.

Thereafter, counsel for the General Counsel (the General Counsel) and Respondent filed timely exceptions to Administrative Law Judge Wagman's Decision. On September 18, 1979, the Board reopened the record in the case and remanded the proceedings for a further hearing in accordance with the Supreme Court's decision in *N.L.R.B.* v. *Baptist Hospital, Inc.*, 442 U.S. 773 (1979). This hearing was held before me on June 11, 1981, in Boston, Massachusetts.

Upon the entire record made on July 11, 1977, and on June 11, 1981, including the demeanor of the witnesses,[2] and after due consideration of all the briefs filed by the General Counsel and the Hospital at various stages of the proceeding, I hereby make the following findings of fact, conclusions of law, and recommendations.

I. JURISDICTION

The Hospital is a Rhode Island corporation which operates a private, nonprofit hospital and provides health care facilities and services for the acutely ill in Provi-

[1] The Union's name appears as amended at the 1981 hearing.

[2] The only witness who testified before Administrative Law Judge Wagman also testified before me.

dence, Rhode Island. The Hospital's gross annual volume of business exceeds $250,000. The Hospital annually causes more than $2,000 worth of goods to be purchased and transported in interstate commerce from and through various States other than Rhode Island to the Hospital's place of business in Rhode Island. I find that, as the Hospital concedes, it is engaged in commerce within the meaning of the Act, and that to assert jurisdiction over its operations will effectuate the policies of the Act.

The Union is a labor organization within the meaning of the Act.

II. ALLEGED PREELECTION UNFAIR LABOR PRACTICES AND OBJECTIONABLE CONDUCT

Between November 26, 1974, and October 10, 1975, a period more than 6 months before the filing of the initial charge herein, Respondent's personnel policies handbook, which is distributed to all new employees, contained the following rule:

> *Solicitation*. In order to protect you and our patients from annoyance or disruption of work, no solicitation of any kind is permitted during working hours or on hospital property without the written permission of the Hospital Administrator. This includes circulating petitions, selling merchandise and chances, and the passing of literature, cards, or written announcements that do not have to do with hospital-business operations . . . .

On September 18, 1975, the Regional Director set aside the April 1975 election partly on the ground that the foregoing rule applied on its face to any place on hospital property and was admittedly enforced in regard to the parking lot, and that employees had admittedly never been notified in writing of the Hospital's alleged practice of permitting solicitation and distribution in the cafeteria during lunchtime and breaktimes.

On October 10, 1975, 20 days before the first rerun election, this rule was superseded by the following rule, which on that date was posted on Respondent's bulletin board, and which was in effect at the time of the second rerun election on April 29, 1976:

> *Solicitation by Employees [of the Hospital]*. In order to protect you and our patients from annoyance or disruption of work, no solicitation or distribution of any kind is permitted during working time and in working areas. Working time *does not* include meal time or rest periods. Working time *does* include working time of both the employee doing the solicitation or distribution, and the employee to whom it is directed. If you have any questions as to the meaning of working time or working areas please ask the Personnel Office for clarification.

Thereafter, this rule (except for the bracketed words) was reprinted in a personnel policies booklet which Respondent distributed to its employees in the spring of 1977. The Union's November 1975 objections to the October 1975 election included an objection based on this rule; the Regional Director found it unnecessary to determine in his February 1976 decision whether this objection had merit, in view of his finding that another union objection was meritorious and was sufficient to invalidate the election.

In an affidavit given to a Board attorney on November 24, 1975, Gerald H. Christman, who at all relevant times has been Respondent's personnel administrator, stated:

> The employees are not allowed to solicit for the union during working time and in working areas, as the recent amendment states. They are not allowed to solicit at any time during [sic] working areas. Working areas are those areas where patient care, business operations, and office operations [sic]. The kitchen and the laundry are also working areas. Corridors are also considered working areas because of the patient and visitor traffic. The lobby is not considered a work area and solicitation would be allowed there, but it has never come up.

This affidavit was introduced into evidence without objection at the initial hearing in April 1977. Christman attended that hearing as a witness for the General Counsel, but was asked no questions about this affidavit. In sustaining the complaint and finding merit in the objections, Administrative Law Judge Wagman's July 1977 Decision relied in part on this affidavit. At the June 1981 hearing before me, Christman testified that employees have never been forbidden to solicit for the Union in "non-patient care areas" such as the laboratory, the laundry, the kitchen, and the storage room, so long as such solicitation does not interrupt someone else who is working. For demeanor reasons, I regard Christman's 1975 affidavit regarding the Hospital's 1975 policy as more reliable than his 1981 testimony.

Between January 1, 1976, and June 1, 1980, Robert E. Lynch, who at the time of the June 1981 hearing was the Hospital's executive vice president, was the administrative officer in charge of the Hospital. He testified at the June 1981 hearing before me that from October 1975 forward employees were permitted to solicit at any time, so long as nobody's work was interfered with in the laundry, the kitchen, and all other "non-patient areas." I attach virtually no probative weight to his testimony with respect to 1975, when he was not yet working at the Hospital. Nor do I accept his testimony with regard to the period between January 1, 1976 (when he started to work at the Hospital), and the April 29, 1976, election, or between the election and the November 28, 1977, promulgation of a different solicitation rule. The credibility of such testimony is diminished by his willingness to testify about the 1975 period, of which he could have no knowledge. Moreover, his uncertainty about whether he ever instructed his subordinates to report to him whenever employees were disciplined for violating hospital rules, his testimony that when acting as administrative officer in an 800-employee hospital he received reports of only five to eight disciplinary actions a year, and his testimony that there were other verbal and written warnings which did not come to his attention show that he had little knowledge of how the management

representatives under him were interpreting the solicitation rule.[3]

The Hospital concedes that, so long as employees who are working are not disturbed, the Hospital could not lawfully forbid solicitation between employees about union matters on their own time in the business operations areas, office operations areas, kitchen, and the laundry. Accordingly, I find that by maintaining this rule the Hospital violated Section 8(a)(1) of the Act and engaged in conduct calling for the election to be set aside. I would reach the same result even if I credited Christman's and Lynch's testimony regarding what employees were in fact permitted to do. Lynch testified that, so far as he knew, employees were never advised in writing that the written rule meant anything different from what it said. Further, the rule on its face is at least susceptible of the interpretation that it forbids solicitation at any time in working areas which are not patient care areas. With exceptions immaterial to this portion of the Decision, such restrictions are unlawful with respect to periods when neither the employee doing the soliciting nor the employee being solicited is expected to be actively working; and the risk of ambiguity must be borne by the promulgator of the rule. *T.R.W. Bearing Division, a Division of T.R.W., Inc.*, 257 NLRB 442 (1981). This conclusion is unaffected by the absence of evidence that anyone was ever disciplined for violating the rule; for all that appears, this rule caused employees to refrain, for fear of punishment, for exercising their statutory right to engage in solicitation in these areas when neither they nor the employees being solicited were expected to be actively working.

III. THE 1977 RULE

On November 28, 1977, Respondent distributed to its employees, posted on hospital bulletin boards, and conveyed to employees through departmental meetings, the following rule, which superseded the October 10, 1975, rule:

> *Solicitation or Distribution by Employees of the Hospital:*
>
> In order to protect our patients from annoyance or disruption, no solicitation or distribution of any kind is permitted in direct patient care areas.
>
> Verbal solicitation by employees is allowed during work time provided it does not interfere with their work performance or that of their fellow employees, and provided it does not disrupt or interfere with patient care or the work flow.
>
> Distribution of a written nature is not permitted during working time.
>
> Work time *does not* include meal time or rest periods. Work time *does* include the working time of both the employee making the distribution and the employee to whom it is directed.

Personnel Administrator Christman testified that this rule forbids employees to solicit in patient rooms, in corridors off patient rooms, in corridors off treatment rooms, in nursing stations, and in elevators when they are being used for patient transport. The General Counsel's brief concedes that this rule is lawful to the extent that it forbids solicitation in patient rooms, and in corridors in the operating-room suite and in the emergency-room suite. However, the General Counsel contends that the rule is unlawful to the extent that it forbids solicitation in all other corridors, in hospital elevators, and in nursing stations.

Respondent's hospital is a multistory structure with a basement and a subbasement. Above the second floor, the Hospital is divided into two wings, an east wing and a west wing. At the third-floor level, it is possible for an ambulatory person to walk between the two wings, but stretchers cannot be carried between the two wings. Above the third-floor level, the two wings are wholly separate, and one wing can be reached from the other only by descending to at least the second floor (or, in case of an ambulatory person, to at least the third floor), walking over to the other side, and going up again. The west wing rises as far as the sixth floor. The east wing rises to the 10th floor, but the 9th and 10th floors are accessible only to maintenance personnel.

The facilities in the hospital include an emergency-room area, a cat-scan area, an X-ray department, a radiology area, and an ultrasound area, on the first floor; an electrocardiogram area and an operating and recovery room area on the second floor; a coronary-care unit in the west wing of the third floor; a respiration-therapy area in the west wing of the fourth floor; an intensive-care unit in the east wing of the fourth floor; and a maternity ward in the west wing of the sixth floor. Patients' bedrooms are located in both wings of the third and fifth floors, and in the east wing of the fourth, sixth, and seventh floors.

The Hospital has three sets of elevators, of which two sets go from the first floor to the top (sixth) floor of the west wing, and the third set goes from the first to the eighth floor of the east wing. All these elevators are used both for the transport of patients and by other persons (staff, ambulatory patients, and visitors) who have occasion to move between floors in the hospital.

In *Central Solano County Hospital Foundation, Inc., d/b/a Intercommunity Hospital*, 255 NLRB 468 (1981), the Board held, in reliance on, *inter alia, Baptist Hospital, supra*, 442 U.S. at 789, that as to hospital no-solicitation rules, "the halls and corridors adjacent to patient rooms, operating rooms, X-ray rooms, and other immediate patient care areas . . . are extensions of immediate patient care areas in which solicitation may presumptively be prohibited." The General Counsel contends that no such presumption should be applied in the instant case, on the ground that, because of the layout of the Hospital, application of such a presumption would permit the Hospital to ban solicitation in practically all the corridors above

[3] Accordingly, I need not and do not pass on the General Counsel's testimony that the assertedly limited scope of the Hospital's exceptions to Administrative Law Judge Wagman's Decision and of the Board's remand order precludes the Hospital from introducing additional evidence regarding the Hospital's application of the 1975 rule.

the basement level.[4] However, the solicitation rule on its face permits employees to solicit other employees (except in "direct patient care" areas) during the working time of either or both, provided such activity does not interfere with anyone's work and does not disrupt or interfere with patient care or the workflow. Moreover, the evidence shows that nonwork areas which are available to employees during their nonwork time for such things as breaks are situated on every floor of the Hospital (except for the basement, which is not contended to contain any patient-care areas), and on every floor of each wing where the wings are separate. More specifically, such areas include the first-floor dining area, snackbar, gift shop, lobby, credit office, and lounge; the second-floor copy room, nurses lounge and locker room, and orderlies' locker and toilet area; the third-floor west-wing solarium and locker area and a classroom in the east wing; the fourth-floor west-wing solarium and east-wing lounge and classroom; two classrooms and a nurses' locker room in the fifth-floor west wing and a conference room in the fifth-floor east wing; the sixth-floor west-wing nurses locker room and east-wing conference room; a seventh-floor conference room; and an eighth-floor open court.[5] In addition, the Hospital is surrounded by parking lots where employees are free to solicit at any time. I conclude that giving normal play in the instant case to the *Intercommunity Hospital* presumption would not unduly limit the employees' opportunity to engage in solicitation activity on Hospital property.

In *Presbyterian/St. Luke's Medical Center*, 258 NLRB 93 (September 21, 1981, ALJD), the Board, in reliance on *Baptist Hospital, supra*, 442 U.S. 773, held valid a solicitation ban in hallways, elevators, and stairways, used for the movement of patients and emergency equipment. Rather similarly, in *Intercommunity Hospital, supra*, the Board found that a hospital had justified its prohibition of solicitation in a central corridor which linked the halls adjacent to patients' rooms with the corrodor adjacent to "the operating room, etc.," because patients were regularly moved through that corridor *en route* to treatment, diagnostic evaluation, and operations and from postoperation recovery rooms to the patient rooms. These decisions establish the validity of the Hospital's ban on solicitation in elevators when they are being used to transport patients.

Intercommunity Hospital, supra, held that because of the varied layouts of nurses stations, prohibitions on solicitation in such areas are not presumptively valid. The Board found such a ban to be valid in the case before it because the desk areas of such stations were not enclosed, fairly loud conversations there could be heard from nearby patients' rooms, and some employees are always on duty there and would be subject to distraction if solicitation were permitted. The Hospital here contains seven nurses stations. The nurses station in the west wing of the sixth floor, which is the maternity ward, is immediately adjacent to the labor and "prep" rooms, and is separated from the hallway only by a counter which is well below chin level and extends only about a fourth of the approximately 46 feet where the nurses station immediately abuts the hallway. The other six nurses stations are separated from the hallway by counters which end well below chin level; the space between the counters and the ceiling is not glassed-in.[6] The nurses station in the third-floor east wing is about 16 feet from the nearest patient's bedroom; the other five stations are about 8 feet away. Inferentially, someone is always on duty at every nurses station. *Intercommunity Hospital* points to the validity of the Hospital's ban on solicitation at the nurses stations.

CONCLUSIONS OF LAW

1. The Hospital is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Between November 27, 1975, and November 27, 1977, the Hospital violated Section 8(a)(1) of the Act by maintaining a rule which forbade union solicitation in working areas which are not patient-care areas, during times when neither the employee doing the soliciting nor the employee being solicited was supposed to be actively working, and thereby engaged in an unfair labor practice which affects commerce within the meaning of Section 2(6) and (7) of the Act.

4. On and after November 28, 1977, the Hospital has not engaged in unfair labor practices alleged in the complaint.

THE REMEDY

Having found that the Hospital has violated the Act in certain respects, I shall recommend that it be required to cease and desist therefrom, and from like or related conduct, and to post appropriate notices.

Upon the foregoing findings of fact and conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended Order:

ORDER[7]

The Respondent, St. Joseph's Hospital, Providence, Rhode Island, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Maintaining any rule which forbids union solicitation, during times when neither the employee doing the soliciting nor the employee being solicited is supposed to

[4] The General Counsel does not suggest that application of the presumption should be affected by the fact that the Hospital permits union solicitation in treatment areas which treat only patients who are employees of the Hospital. Accordingly, I do not consider this issue.

[5] Christman testified that this was also true of certain toilet areas. However, most of such areas can accommodate only one employee at a time.

[6] The basis for many of the factual findings in these two sentences is summarized in my February 5, 1981, order denying motion that a view be taken.

[7] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

be actively working, in working areas other than immediate patient-care areas, corridors adjacent to immediate patient-care areas, elevators, or nurses stations.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Post at its Hospital in Providence, Rhode Island, copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by Respondent's authorized representative, shall be posted by it, immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the second rerun election conducted in Case 1-RC-13628 on April 29, 1976, be set aside and that the Regional Director for Region 1 conduct a third rerun election at a time he deems appropriate.

[8] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had the opportunity to present their evidence and state their positions, it has been found that we violated the National Labor Relations Act. We have been ordered to post this notice.

WE WILL NOT maintain any rule which forbids employees from engaging in union solicitation, during times when neither the employee doing the soliciting nor the employee being solicited is supposed to be actively working, in working areas other than immediate patient-care areas, corridors adjacent to immediate patient-care areas, elevators, or nurses stations. The solicitation rule which has been in effect since November 28, 1977, does not forbid union solicitation during such time in areas where it must be permitted.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under the Act.

ST. JOSEPH'S HOSPITAL